



## POLICE DEPARTMENT

September 24, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Wayne Lowe  
Tax Registry 932926  
28 Precinct  
Disciplinary Case No. 85284/09  
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The above-named member of the Department appeared before the Court on March 22 and June 28, 2010, charged with the following:

1. Said Police Officer Wayne Lowe, assigned to the 30th Precinct, while off-duty, on or about December 4, 2007, in Bronx County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said police officer was wrongfully involved in a physical altercation with Rafael Campos, in that said police officer did grab and/or punch Mr. Campos.

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

The Department was represented by Lisa McFadden, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

The Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Rafael Campos, Julio Garcia, Mark Martinez, Police Officer Gregory Erbentraut and Sergeant Robert Olson as witnesses.

Rafael Campos

Campos had been employed as a tow truck driver for 20 years. He owned his own company, J&M Service and Recovery, which had done over one thousand vehicle repossessions.

On December 3, 2007, Campos received documentation from Wells Fargo Auto Finance to repossess the Respondent's car (see Department's Exhibit [DX] 1, Order to Repossess). At approximately 2:00 p.m. the following day, Campos went to [REDACTED] to effectuate the repossession. Campos, who was driving a white tow truck with his company's marking on it, found the Respondent's vehicle in the driveway of a private house. The driveway was not gated or fenced in. Because the Respondent's car was facing into the driveway, Campos hooked up his truck to the rear of the car and dragged the car out to the street. Because the car was supposed to be towed from the front, however, Campos had to lower the car and hook up his truck to the other end.

At that point, according to Campos, the Respondent came out of the house yelling. Campos informed the Respondent that the bank had sent him to pick up the car. The Respondent jumped into his car and tried to drive off, causing one of the wheels to come off of the wheel lift. The Respondent then got out of the car and approached the side of the tow truck. Campos rolled down his window halfway and tried to explain to the Respondent again that he was from the bank. The Respondent, who was angry, grabbed Campos by the shirt. As Campos attempted to

raise the window, the Respondent punched him a couple of times on the left side of his head. Due to the tow truck's height, the punches were not straight. Campos described the punches as "not really hard." At the time, the Respondent was still holding onto Campos's shirt and continued to hold onto it for a couple of minutes. At one point, a woman (subsequently identified as [REDACTED] [REDACTED]) came out of the house and spoke with the Respondent. The Respondent told [REDACTED] to take their personal property out of the car and call 911.

When a United Parcel Service (UPS) truck drove by, the UPS employees stopped, got out of their truck, and asked what was going on. It was at that point that the Respondent released Campos's shirt. Campos then rolled up his window all the way and called 911.

Campos testified that at no point during the incident was the Respondent's car damaged. Nor did the Respondent identify himself as a member of the service. As a result of the incident, Campos suffered a scratch on the neck and a mild headache.

On cross-examination, Campos testified that it was not his practice before repossessing a car to warn the car owner. At no point while pulling out of the driveway did Campos strike the Respondent with the car. As the Respondent held Campos's shirt with his left hand, the Respondent's left forearm was pushing down on the window, making it impossible for Campos to roll up the window. The Respondent also pulled Campos by the shirt toward the window. Meanwhile, the Respondent threw two or three punches with his right hand. At the time, the window was halfway up, leaving approximately 11 inches of open space for the Respondent to reach through.

The Respondent told [REDACTED] to call 911 while still holding onto Campos's shirt. The UPS workers waited at the scene for approximately ten minutes until the police came. Campos

did not know the names of the UPS workers. The Respondent also waited outside the house for the police to arrive. At no point during the incident did Campos turn off the engine of his tow truck, but he did have the brakes on while he waited for the police. Campos did not receive any medical treatment, miss any work, or suffer any lasting effects from his injuries.

On re-direct examination, Campos testified that he did not move his truck once he hooked it to the front of the Respondent's car. As a reposessor, he had the right to collect a car from an open driveway. When confronted by a debtor, the only thing he was required to show was the repossession order. Campos never sought to have the Respondent arrested for his actions. Nor did he seek to sue him in a civil proceeding.

On re-cross-examination, Campos testified that it was only after he went into the driveway and moved the car that he informed the Respondent he had been sent by the bank.

Upon questioning by the Court, Campos testified that his company's name, address, telephone number, and towing rates were all written on the side of his truck. The truck had commercial plates. His company was licensed to perform towing in New York City, although the truck did not "specifically" say that.

DX 2 was a recording of three 911 calls relating to the incident. Caller 1 was unidentified. Caller 2, who stated that he was a retired police officer, noted that the incident appeared to be a vehicular accident that led to a dispute, and "somebody looks like they're throwing punches." Campos was Caller 3. He stated that someone punched him in the face with his fist. DX 2A was the transcript of Campos's call.

Julio Garcia

Garcia had been employed as a driver for UPS for four years. On December 4, 2007, he was working with a partner, Mark Martinez. That day, as he was making deliveries, he observed a tow truck backing into a driveway. There was an open gate at the end of the driveway.

Garcia observed the Respondent run out of the house yelling, “[W]hat you are doing, who are you, that’s my car.”<sup>1</sup> The tow truck driver, Campos, ignored the Respondent. At one point, according to Garcia, the tow truck driver “just got tired of all the bickering and just rammed the car back, picked it up, hit him and that’s when the car owner flipped out.” The Respondent did not fall as result of getting struck by the tow truck. He shoved his hands through the driver’s open window. Campos pushed the Respondent’s hands away, and Garcia did not observe the Respondent actually make physical contact with Campos. Martinez tried to calm the Respondent down, but Garcia did not take any action because the Respondent was “a much bigger guy.”

On cross-examination, Garcia testified that the Respondent yelled that he was struck in the leg. By that point, Garcia and Martinez had gotten out of the UPS truck and were standing ten to fifteen feet away from the Respondent. Campos’s window was open halfway, and the Respondent’s hands were inside the tow truck for several seconds. Garcia did not see a woman at the scene, and he did not recall hearing the Respondent yell for someone to call 911. The Respondent identified himself as a police officer.

On re-direct examination, Garcia testified that the Respondent seemed very upset after getting hit with the tow truck.

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<sup>1</sup> Several of the witnesses either did not identify the Respondent, or did not refer to him or Campos by name. For the sake of simplicity, they will be referred to as Campos and the Respondent in this decision.



Upon questioning by the Court, Garcia testified that the Respondent was struck by the tow truck's bumper as the truck was going in reverse. The tow truck's hook was down because Campos was reversing to hook up the Respondent's car.

Mark Martinez

Martinez had been employed as a UPS driver for 14 years. As he and Garcia were making deliveries on December 4, 2007, he observed a tow truck that had put a car in the middle of the street. The Respondent came out of the house, yelling, and asked the tow truck driver, Campos, what he was doing. The Respondent asked four or five times if he was stealing the car, but Campos did not answer.

Martinez testified that Campos quickly reversed the tow truck, pinning the Respondent against the car. The Respondent, who was yelling and upset, stepped onto the side bar of the truck and argued with Campos through a partially open window. The Respondent reached into the window and attempted to hit Campos. Martinez described the action: "It kind of was like a push and a grab. It's hard to explain, it was such a little window he is a big guy. It could have been a punch, it could have [been] a pull, it could have been a grab, from the angle I had I just saw him on the tow truck in the window." The interaction lasted 30 or 40 seconds, until Martinez pulled the Respondent off of the truck.

Martinez was no longer present when the police arrived at the scene. Once he and Garcia saw that the Respondent "was calm and actually tried to talk to him and kind of walked away we left, I had to go back to work."

Martinez stated that he assumed from the start that Campos was repossessing the vehicle. He decided to get involved in the situation only after the Respondent was struck and became upset.

On cross-examination, Martinez testified that when the Respondent exited the house, the first thing he did was approach the side of the tow truck to speak with the driver. At that point, the Respondent was not yelling. He was just asking Campos questions, but Campos did not tell him anything or show him any documentation. According to Martinez, the tow truck struck the Respondent at a high rate of speed, causing the Respondent to scream. At the Respondent's request, Martinez called 911. At one point, Martinez asked Campos if he was all right. He replied that he was okay and did not complain of any pain. Martinez could not see any injuries on Campos.

Upon questioning by the Court, Martinez testified that when the tow truck struck the Respondent, he was pinned for five to ten seconds. Although Martinez saw the Respondent reach into the tow truck, he did not see any physical contact made with Campos.

Police Officer Gregory Erbentraut

Erbentraut, a four-year member of the Department, was assigned to the 45 Precinct. On December 4, 2007, a dispute on [REDACTED] came over the radio at 1:37 p.m. A second call for the same location came over the air at 1:45 p.m. as an assault in progress.

Erbentraut and his partner arrived at the scene at 2:00 p.m. At that point, the Respondent's car was already attached to the tow truck. The Respondent was standing in the street, waving at the Department vehicle to flag the officers down. The Respondent, who was upset, identified himself as a member of the service. He told Erbentraut that while at his

girlfriend's house, he looked out the window and saw his car getting hooked up to a tow truck "like it was being stolen." When the Respondent exited the house and approached the tow truck, Campos tried to drive away. The Respondent tried to flag down Campos, but Campos would not stop the truck, causing the Respondent's car to strike the Respondent in the leg. When Campos still did not stop driving away, the Respondent reached into the tow truck and grabbed him. Erbentraut did not observe any ripped clothing or injury to the Respondent, but the Respondent did request medical assistance after being transported from the scene to the 45 Precinct station house. Erbentraut noted that because a member of the Department was involved, the patrol supervisor ordered that all parties be brought to the station house "to sort . . . everything out." An ambulance was called for the Respondent at 2:33 p.m.

Erbentraut also interviewed Campos while at the scene. Campos told him that when he hooked up the Respondent's car to the truck, the Respondent approached him and a verbal dispute commenced. The dispute turned physical, with the Respondent grabbing him by the neck and collar, and punching him several times in the face. Erbentraut did not see any bruising to Campos's face, but he did see "some redness around his neck area that appeared to be like scratches . . . red marks like someone was pulling at him."

#### Sergeant Robert Olson

Olson was assigned to the Bronx Investigations Unit. On December 4, 2007, he responded to the 45 Precinct station house to investigate an off-duty incident involving the Respondent. He did not recall seeing any ripped clothing or injury to the Respondent. The Respondent did, however, seek medical attention for a knee injury. The Respondent was not admitted to the hospital.



The Respondent admitted to Olson that he grabbed Campos by the shirt. He further admitted that he was approximately a month behind on his car payments. When interviewing Campos that day, Olson observed redness and scratches to his neck.

On cross-examination, Olson testified that he took photographs of Campos's injuries, but the photographs were lost when his unit switched to a new computer system. Olson testified that the Respondent's knee injury occurred when he was struck by the tow truck. Witnesses at the scene confirmed that the Respondent was in fact struck by the truck.

Olson also interviewed [REDACTED]. Olson "believe[d] if she was the primary driver possibly of the vehicle." It was registered to the Respondent and they both were making payments on it.

#### The Respondent's Case

The Respondent testified on his own behalf.

#### The Respondent

The Respondent, a seven-year member of the Department, testified that he and his girlfriend, [REDACTED], purchased a car together, a 2003 Saturn L200. [REDACTED] had primary use of the car, but she failed to keep up with the car payments. The Respondent and [REDACTED] signed a document allowing the lender, Wells Fargo, to take payments directly out of [REDACTED]'s bank account.

The Respondent testified that he was at [REDACTED]'s house at approximately 1:30 p.m. on December 4, 2007, when he heard the Saturn being pulled out of [REDACTED]'s "parking space" on the side of her property. This area was separated from the street by a fence. When the

Respondent stepped outside to see what was going on, he saw the vehicle in the middle of the street. He thought that the car was being stolen because it had been stolen from her residence a couple of months earlier.

The Respondent then noticed the tow truck, approached it, and asked Campos what was going on. According to the Respondent, Campos would not talk to him, cursed at him, and told him to get out of the way. When the Respondent walked back toward the car, Campos reversed very quickly, striking the Respondent and knocking him over. As a result, he suffered contusions and swelling on his knees.

When the Respondent stood up, he approached Campos's window and informed Campos that he had run over a police officer. Campos yelled at the Respondent to "get the F away from him." The Respondent admitted that he grabbed Campos by the sweater because he did not want Campos to drive away.

The Respondent testified that he yelled for somebody to call 911. Campos told the Respondent that he would call 911 himself. The Respondent let go of Campos once he heard Campos on his cell phone with the 911 operator. According to the Respondent, he never punched Campos.

The Respondent testified that he was approximately 6'4½" tall, and weighed 270 pounds at the time of the incident.

On cross-examination, the Respondent admitted that he was aware payments for the car were overdue. At no point did he show Campos police identification. After getting hit by the tow truck, he was angry and in pain. Although he believed that Campos was attempting to steal the car, it did not occur to him to take down the license plate number on the tow truck. He explained that it did not cross his mind to do so because everything was happening so fast.

The Respondent denied that the UPS driver pulled him off the truck.

On re-direct examination, the Respondent testified that the UPS driver patted him on the back and informed him that the police had been called. The Respondent never felt the UPS driver grab him, put his arms around him, or pull him away from “the car.”

Upon questioning by the Court, the Respondent stated that the tow truck had the word “towing” written on its side, but he did not recall seeing a company name on it or if it had commercial plates. He reiterated that he held onto Campos because Campos had just run him over and he did not want him to get away.

The Respondent testified that he was no longer in a relationship with [REDACTED]

#### FINDINGS AND ANALYSIS

The charge against the Respondent alleges that he “did grab and/or punch” Rafael Campos during a physical altercation. Campos was a tow truck driver performing an automobile repossession. He came to a residence on [REDACTED] in The Bronx where [REDACTED] was living. [REDACTED] was then in a romantic relationship with the Respondent. The couple shared ownership of the automobile in question, a Saturn. He had made payments on it, but at the time [REDACTED] was supposed to be making payments on it. The Respondent admitted that payments were over a month late. Campos had an “Order to Repossess” from Wells Fargo, the creditor.

As Campos placed the vehicle in the street and prepared to put it on the tow truck, the Respondent came outside and began asking what was going on. Campos said he explained the situation, although this was denied by the Respondent, and by Mark Martinez and Julio Garcia, two UPS employees that were driving down the block in their delivery truck. The Respondent

and the UPS employees said that Campos backed the tow truck into the Respondent; Campos denied this.

The witnesses, including the Respondent himself, agreed that the Respondent went up to Campos's driver-side window and reached in with his arm. The Respondent conceded that he grabbed Campos by the shirt to prevent him from driving away. He noted that the Saturn had been stolen in the past, and he was worried that Campos was doing the same thing.

Campos and the Department alleged that he was punched in the face, though not very hard, although the Respondent asserted that he only grabbed Campos's sweater. The UPS employees saw the Respondent reach into the truck, but neither could say exactly what the Respondent did with his hands. The only injuries Campos received were scratches on his neck and a slight headache. As the Respondent's attorney pointed out, if the 6'4½", 250-pound Respondent had punched Campos square in the face, the victim would have suffered a greater injury than scratches.

Nevertheless, the specification alleges that the Respondent "did grab and/or punch" Campos, and the Respondent admitted grabbing Campos by his clothing. The Respondent's attorney contended that his reaction was understandable in light of the prior car theft and the fact that Campos had struck him with the truck. Understandable perhaps, but not acceptable. If the Respondent's true concern was car theft – unlikely in light of the fact that the incident took place in the middle of the afternoon, that Martinez and Garcia recognized the event as a facially legitimate tow, and Campos's testimony that his tow truck had markings denoting it as a commercial vehicle doing business as a tow truck – the proper recourse would be to call 911 and to record evidence. Notably, the Respondent conceded that he did not think to take down the tow truck's license plate. The Court also notes that the Respondent, according to independent

witnesses like the UPS driver, asked Campos who he was and said that the Saturn was his car. These are unlikely statements to make to a suspected thief.

Furthermore, the Respondent did not grab Campos to prevent further bodily harm. The Respondent, by his own testimony, got knocked down by the tow truck, got back up, *then* went to the driver-side window and grabbed Campos through it. It was only then that Campos attempted to put the vehicle in gear and drive away. There was no justification, therefore, for the Respondent to grab Campos by the clothing because by doing so, the Respondent re-initiated a physical confrontation rather than distance himself from it. His actions were contrary to the good order, efficiency and discipline of the Department, and the Court finds the Respondent Guilty of the specification.

#### PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of becoming involved in a physical altercation with a tow truck driver. The Respondent grabbed the driver by his clothing in an attempt to prevent him from driving away with the repossessed vehicle that ostensibly belonged to the Respondent and his girlfriend.



The Respondent's prior disciplinary record, specifically with regard to an incident that occurred in 2006 (see Confidential Mem., infra), indicates that the Respondent has engaged in similar belligerent conduct in the past.

Accordingly, the Court recommends that the Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that the Respondent forfeit 30 vacation days. See *Case No. 78193/02*, approved Mar. 24, 2003 (nine-year member with no prior disciplinary history forfeited 25 vacation days for harassment and provoking a physical altercation during an off-duty road rage incident; member got out of his car and a heated verbal argument ensued, escalating to a physical altercation, with both drivers receiving minor injuries).

Respectfully submitted,



David S. Weisel  
Assistant Deputy Commissioner Trials

**APPROVED**  
DEC 14 2010  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER

POLICE DEPARTMENT  
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER WAYNE LOWE  
• TAX REGISTRY NO. 932926  
DISCIPLINARY CASE NO. 85284/09

In 2008 and 2009, the Respondent received an overall rating of 4.0 “Highly Competent” on his annual performance evaluation. He was rated 3.0 “Competent” in 2007. [REDACTED]  
[REDACTED]

The Respondent has been the subject of one prior disciplinary adjudication. In 2008, he forfeited 30 vacation days after being found guilty at trial of pushing his ex-girlfriend, attempting to engage the ex-girlfriend’s new boyfriend in a physical altercation, being belligerent when on-duty personnel responded to the scene, and neglecting to immediately identify himself as a member of the service (see *Case No. 82746/07*, signed Sept. 29, 2008). In April 2008, the Respondent was placed on Level-II Discipline Monitoring for serious misconduct.

For your consideration.



David S. Weisel  
Assistant Deputy Commissioner – Trials